

NO. 39250-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN G. GILGER,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
BY _____
OFFICIAL

COURT OF APPEALS
DIVISION TWO

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert Harris, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court's refusal to instruct the jury on third degree rape violated appellant's constitutional right to present a defense.

Issue pertaining to assignment of error

Appellant was charged with second degree rape, and the defense proposed instructions on third degree rape. Where the defense presented affirmative evidence from which the jury could infer the intercourse was nonconsensual but without forcible compulsion, does the court's failure to instruct the jury on the lesser offense require reversal?

B. STATEMENT OF THE CASE

1. Procedural History

On September 2, 2008, the Clark County Juvenile Court declined jurisdiction in a charge against appellant Jonathan Gilger, who was then 17 years old. CP 1-2. The Clark County Prosecuting Attorney thereafter charged Gilger in Superior Court with one count of second degree rape. CP 3; RCW 9A.44.050(1)(a). The case proceeded to jury trial before the Honorable Robert Harris, and the jury returned a guilty verdict. CP 82. The court imposed a standard range sentence of 110 months to life, and Gilger filed this timely appeal. CP 88, 98.

2. Substantive Facts

A.F. was looking for something to do after finishing work on a Saturday night. 3RP¹ 49-50. When she was unable to reach her friend Amanda Nelson on the phone, she called Nelson's ex-boyfriend, Jonathan Gilger. 3RP 50. Gilger invited her to come over to drink and told her she could sleep on the couch if she wanted to. 3RP 51. A.F. accepted. 3RP 52. She had been to Gilger's house a few times in the past with Nelson, and she saw this as an opportunity to get to know Gilger better. 4RP 150, 159.

Gilger picked A.F. up at McDonalds, with his uncle driving, and gave her a ride back to his home. 3RP 52. When they arrived, they stood outside for a while smoking and talking to Gilger's friend Ronnie Smith. 3RP 54, 119; 4RP 336. Gilger then got a bottle of alcohol from his uncle's trailer, and he and A.F. went inside the house. 3RP 54-55. Gilger poured them some drinks, and they headed to Gilger's room to hang out. 3RP 56. A.F. smoked another cigarette while Gilger talked to Smith through the window. 3RP 67-68. After about 20 minutes, Gilger started kissing A.F., and the contact proceeded to sexual intercourse. 3RP 71, 78. Afterwards, Gilger told A.F. his mother did not want anyone spending the

¹ The Verbatim Report of Proceedings is contained in six volumes, designated as follows: 1RP—9/2/08; 2RP—2/9/09 (jury selection and opening statements); 3RP—2/9/09 (3.5 hearing and trial); 4RP—2/10/09; 5RP—2/11/09; 6RP—4/30/09.

night after all, so Gilger, his uncle, and Smith drove her back to McDonalds. 3RP 98-100.

After saying goodbye to Gilger, A.F. walked to a nearby apartment complex, where she ran into a friend. 3RP 101-02. She told him Gilger had raped her, and he called 911. 3RP 102-03. A.F. was taken to the hospital, where she was interviewed, examined, and photographed. 3RP 104, 106. She also talked to the police while she was at the hospital. 3RP 105.

The next morning, police picked Gilger up at his home and took him to an office to question him. 4RP 222. At first, Gilger denied that he and A.F. had been drinking and that there was any sexual contact. 4RP 226, 229. He eventually admitted to both, saying the sex was consensual. 4RP 236, 243. Gilger explained to the officers that he was afraid he would get in trouble for drinking because he is underage, and he was too embarrassed to talk about the sex. 4RP 236, 313-14.

Gilger was charged with second degree rape. CP 3. At trial, A.F. testified that she told Gilger “no” repeatedly, but he forcefully removed her pants and had vaginal intercourse with her. 3RP 76, 78. She said “please stop” and tried to push Gilger away with her legs. 3RP 81. A.F. testified that Gilger then flipped her over and had anal intercourse with her. 3RP 82-83. She was crying and begged him to stop. 3RP 89. Gilger

then flipped her back over and held her legs toward her head while he again had vaginal intercourse with her. 3RP 91-92. That lasted only a moment, because A.F. told Gilger she needed to use the bathroom. 3RP 92.

On cross examination, A.F. explained that while she said Gilger had removed her shoes and pants forcefully, he was not holding her down when he did so. 3RP 130. She did not get up as Gilger stopped to put on a condom, although she continued to say no. 3RP 131. A.F. did not scream at all during the incident. 4RP 153. In fact, she did not protest any louder than when Gilger first started kissing her. 3RP 131. She did not try to scratch or hit Gilger because she was afraid he would scratch or hit her in return. 3RP 132; 4RP 153. A.F. testified that she was afraid Gilger would be violent if she screamed or resisted, although she admitted he never threatened her. 4RP 159.

The nurse who examined A.F. at the hospital repeated what A.F. had told her. 4RP 176-83. She also identified photographs taken during the examination and gave her opinion that A.F. had experienced forceful intercourse. 4RP 187-200, 203. The emergency room doctor also repeated A.F.'s statements and testified that A.F.'s injuries were consistent with forceful intercourse. 4RP 264-66, 277.

At the close of evidence, the court denied defense counsel's requested instructions on third degree rape. CP 58-60; 5RP 366. It found there was no question force was used to accomplish the anal intercourse, based on A.F.'s testimony. Because Gilger's version was that she consented, the jury would be required to believe one or the other, and an instruction on third degree rape was not appropriate. 5RP 365-66. Defense counsel entered a formal objection to the court's ruling. 5RP 367.

Defense counsel argued in closing that the jury first had to decide whether there was consent. If it did not find the intercourse was consensual, it had to decide if there was forcible compulsion. He pointed out that forcible compulsion related to A.F.'s resistance, not her injuries. 5RP 389-90. Counsel reminded the jury that A.F. had testified Gilger never threatened her, she did not get up and leave when she had the opportunity, and she did not scream. 5RP 398-99. He concluded by telling the jury that if it decided there was no consent, it should consider whether there was really the kind of resistance required to prove forcible compulsion. 5RP 399.

C. ARGUMENT

THE COURT'S REFUSAL TO INSTRUCT THE JURY ON THIRD DEGREE RAPE PRECLUDED GILGER FROM PRESENTING HIS DEFENSE, AND REVERSAL IS REQUIRED.

When the State charges a defendant with a crime that is divided into degrees, the jury may find the defendant not guilty of the degree charged and guilty of any lesser degree of the offense. RCW 10.61.003. A defendant is entitled to have the jury instructed on an inferior degree of the offense charged if the evidence gives rise to an inference that the defendant committed the lesser offense instead of the greater. State v. Ieremia, 78 Wn. App. 746, 754-55, 899 P.2d 16 (1995), review denied, 128 Wn.2d 1009 (1996). The appellate court reviews a trial court's refusal to give an instruction based on the facts of the case for abuse of discretion. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). If the evidence would permit a jury to find the defendant guilty of the lesser offense and acquit him of the greater, the court abuses its discretion in refusing to instruct on the lesser offense. State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997).

Gilger was charged with second degree rape. To convict him of that offense, the State had to prove he had sexual intercourse with A.F. by

forcible compulsion.² CP 72; see RCW 9A.44.050(1)(a). Gilger requested jury instructions on third degree rape. CP 58-60. That offense requires proof of sexual intercourse with someone other than the accused's spouse, despite clearly expressed lack of consent. RCW 9A.44.060(1)(a). Third degree rape does not require proof of forcible compulsion. Id. Because there was affirmative evidence from which the jury could find Gilger committed only third degree rape, he was entitled to have the jury instructed on that offense. See Ieremia, 78 Wn. App. at 754-55.

When determining whether the evidence at trial warranted instructions on a lesser offense, the appellate court must view the evidence in the light most favorable to the party requesting the instructions. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). In this case, A.F. testified that Gilger never threatened her. 4RP 159. Although she found his size intimidating, she admitted that alone did not imply physical violence. 4RP 160. She also testified that she never screamed, hit, or scratched Gilger, he did not hold her down, and she did not get up when she had the opportunity as he stopped to put on a condom. 3RP 130, 131, 132; 4RP 153. She simply said no, expecting he would take her feelings into consideration. 4RP 154.

² “‘Forcible compulsion’ means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6).

Viewing this evidence in the light most favorable to the defense, the jury could find that there was no forcible compulsion, in that A.F. did not offer any resistance which was overcome by physical force, and there was no threat, express or implied, which placed her in fear. See RCW 9A.44.010(6). The fact that A.F. also testified she was forcibly raped, or that the medical evidence was consistent with her claims, does not preclude an instruction on third degree rape. The question for the court in deciding whether to instruct on the lesser offense was not whether there was sufficient evidence of forcible compulsion. Rather, the question was whether there was evidence from which the jury could infer Gilger was guilty of only third degree rape. See Warden, 133 Wn.2d at 563 (each side is entitled to instructions supporting theory of case where there is evidence to support that theory). Because the jury could infer from the evidence that Gilger had sexual intercourse with A.F., who was not his wife, without forcible compulsion but over her clearly expressed lack of consent, Gilger was entitled to have the jury instructed on third degree rape. See RCW 9A.44.060(1)(a).

The court below refused the requested instructions, however, because there was evidence Gilger had told the officers A.F. consented. Disregarding A.F.'s testimony on cross examination, the court reasoned

that the jury would have to find either forcible compulsion or no rape at all. 5RP 365-66.

The trial court may not instruct the jury on third degree rape where the State's evidence supports only second degree rape, and the defense evidence supports only that no rape occurred. State v. Wright, ___ Wn. App. ___, 214 P.3d 968, 972-73 (2009). In Wright, two defendants were charged with second degree rape of the same victim. The victim testified she was raped by more than one person as she was held down on the bed, her clothing was removed, and she struggled to get free. One defendant testified he did not have sexual intercourse with the victim, while the other testified they had consensual sex. Wright, 214 P.3d at 970. This Court held that "the trial court erred by giving the third degree instruction because neither [the victim's] testimony nor the defendants' evidence supported an unforced, nonconsensual rape." Wright, 214 P.3d at 972.

In support of its holding, the Wright Court cited to State v. Charles, 126 Wn.2d 353, 894 P.2d 558 (1995). In Charles, the victim testified that the defendant forced her to the ground, she struggled, and the defendant forced her to have sex. The defendant testified that they had consensual sex. If the jury believed the victim, the defendant was guilty of second degree rape. If it believed the defendant, he was not guilty of any rape. Charles, 126 Wn.2d at 355-56. The Supreme Court held that

the trial court properly refused to instruct the jury on third degree rape because there was no affirmative evidence that the sexual intercourse was unforced but nonconsensual. Charles, 126 Wn.2d at 356.

Here, contrary to both Wright and Charles, there was affirmative evidence of nonconsensual but unforced intercourse. Gilger did not testify at trial, although the State presented his pretrial statements that he had consensual sex with A.F. But defense counsel also developed evidence through cross examination of A.F. that tended to show the absence of forcible compulsion, even if there was no consent. This affirmative evidence that the sexual intercourse was nonconsensual but without forcible compulsion required the court to give the instructions on third degree rape requested by the defense.

Unlike the defendant in Charles, Gilger did not rely solely on a defense of consent. Significantly, defense counsel argued in closing that there was either consent based on Gilger's pretrial statements, or there was non-consensual sex without forcible compulsion, based on A.F.'s testimony at trial. 5RP 389-90, 398-99.

The trial court may not refuse to instruct on a lesser offense on the basis that the theory supporting the instruction is inconsistent with another theory supported by the evidence. Fernandez-Medina, 141 Wn.2d at 460. In Fernandez-Medina, the defendant was charged with attempted first

degree murder or first degree assault based on allegations that he placed a gun to the victim's head. Although nobody saw him pull the trigger, the victim and another witness testified that they heard a clicking sound, as if the trigger had been pulled but the gun failed to discharge. Fernandez-Medina, 141 Wn.2d at 451. The defendant denied being present at the time of the incident. He also presented testimony from an expert witness who indicated that the handgun allegedly used could make clicking sounds even when the trigger was not pulled. A State expert confirmed this testimony. Fernandez-Medina, 141 Wn.2d at 451-52.

The defense requested instructions on second degree assault, but the trial court declined, and the Court of Appeals affirmed. Fernandez-Medina, 141 Wn.2d at 452. The Supreme Court reversed, holding that expert testimony regarding the gun supported an inference that the defendant did not pull the trigger when he held the gun to the victim's head. If the requested instruction had been given, the jury reasonably might have inferred that the defendant did not intend great bodily injury but only created an apprehension of harm, thus supporting a conviction of second degree assault rather than first degree assault. Fernandez-Medina, 141 Wn.2d at 457.

Here, there was evidence to support both a defense of consent and a defense that the sexual intercourse was nonconsensual but without

forcible compulsion. Because there was evidence in the record to support an inference that Gilger was guilty of only third degree rape, it was error for the court to refuse instructions on that offense, even though there was also evidence which supported a defense of consent. See Fernandez-Medina, 141 Wn.2d at 461.

An accused is assured the right to fairly defend against the State's accusations. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The right to present a complete defense is protected by the Sixth and Fourteenth Amendments to the United States Constitution. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). These constitutional protections include the right to present one's own version of the facts and to argue one's theory of the case. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The state constitution protects these rights as well. Wash. Const. art. I, § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

The court's refusal to give the instructions on third degree rape prevented Gilger from presenting his theory of the case to the jury. Without the instruction, the jury could disregard A.F.'s testimony on cross examination that there was no threat, she did not scream or fight, and she did not get up and leave when she had the chance. Furthermore, without

the requested instructions, the jury's only alternative to the second degree rape conviction was a not guilty verdict, a difficult verdict to enter if it believed the sex was nonconsensual. In fact, the jury seemed to be struggling with this issue during deliberations, when it asked the court to explain both the meaning of second degree rape and the punishment for that offense. CP 79, 81. Had the third degree rape instructions been given, the jury could have reasonably inferred from all the evidence that Gilger was guilty of only the lesser offense. The court's error precluded the defense from presenting its theory of the case, and reversal is required. See Warden, 133 Wn.2d at 564 (refusal to give instruction on lesser included offense when supported by evidence prevented defense from presenting theory of case and constituted reversible error).

D. CONCLUSION

The trial court's refusal to instruct the jury on third degree rape, when there was affirmative evidence that the intercourse was nonconsensual but without forcible compulsion, violated Gilger's constitutional right to present a defense. Reversal is required.

DATED this 16th day of October, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of Brief of Appellant in *State v. Jonathan G. Gilger*, Cause No. 39250-0-II directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
October 16, 2009

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